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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1119

VIRGINIA RICHMOND,

Petitioner,

vs.

ALBERT WEINER, as Executor of the Estate of Harry Soforenko,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

JURISDICTION

Jurisdiction in the Supreme Court of the United States is conferred by Title 17, Sections 1, 28, 30 and 101, U.S. Codes (Copyrights) and Title 28, Section 1254(1), U.S. Codes.

Although jurisdiction of the District Court commenced after the filing of the complaint, it is the contention of petitioner that federal jurisdiction was lost by the Dis-

trict Court after it determined solely the issue of joint venture and proceeded no further with the case, that this was an issue purely within the jurisdiction of the state courts and that the cause should have been stayed pending further state court proceedings.

The opinion of the Court of Appeals was rendered September 9, 1965. (CCA 9, 18,997) A petition for rehearing was duly filed on October 8, 1965 and on November 17, 1965, on petition for rehearing, the Court of Appeals issued a further order for a response to the provisions of Exhibit A attached to the defendant's answer and counterclaim and Exhibit 71 introduced in evidence. (R. 367) The petition for rehearing was denied on December 15, 1965. (R. 377) This petition for certiorari is filed within 90 days of the denial of the petition for rehearing.

STATUTES INVOLVED

The statutes involved, to-wit: Title 17, Sections 1, 28, 30, and 101 are set forth in Appendix B hereof.

The constitutional provisions involved are: Fifth Amendment, United States Constitution (Fair Trial) and Article I, Section 8, sub. 8, United States Constitution.

OPINION BELOW

The opinion of the Court of Appeals is contained in 353 F.2d 41 and is set forth herein in Appendix A.

THE FACTS

Petitioner (plaintiff), a woman, is a writer, editor, compiler, composer and playright. Prior to February of

1957 she was the sole proprietor of the Virginia Richmond Enterprises which comprised two publishing houses and a recording company located at 1610 North Wilcox Avenue, Los Angeles. (R. 20-21)

On February 1, 1957 petitioner met the defendant, a medical doctor, who stated that he had bought a pamphlet called "General Practice" and had been a publisher of this publication for 18 years and needed her help. He had sought her out. He said the money from the pamphlet was used for clinical studies. Petitioner and defendant entered into an agreement to handle the publication. Plaintiff testified that they agreed that the copyrights and works which she wrote and would write would be in the plaintiff and that the defendant would get 50 per cent of the profits alone for inducing a group to back a play which she had written to be placed on Broadway in New York. Defendant told plaintiff he had several sanitariums and a chain of laboratories and that he was on a selling trip all of the time.

In February of 1957 plaintiff went to work on defendant's magazine based on these oral agreements. (R. 30-31) Plaintiff went to the American Medical Association convention and while there she conceived the idea of a compilation of directories for doctors. (R. 35) She wrote a tentative table of contents for this book while still in New York, which was to become "M.P.I." (R.36)

Plaintiff, on her return to Los Angeles, talked to defendant about her idea. (R. 39) An agreement was reached whereby plaintiff was to go ahead and she was to be the author and owner of all of the copyrights that would be obtained on such works and was to be the

proprietor of the works. The defendant, Dr. Harry Soforenko, was to devote time to the sale of the works and to keep an accounting and if a profit was made on the sale, it was to be divided equally between the parties.

An agreement was made that the copyrights were to remain in plaintiff. (R. 41) Also, a section on post graduate courses to be called "Postgrad" would be published separately. Plaintiff did the necessary research, writing, editing, compiling, directing and supervising required for the production of this work and certificates of registration were issued to her and in her name upon proper affidavit and application showing title to the copyright in each instance to be in the plaintiff. All of this was done with the full knowledge and consent of the defendant. (R. 186)

Defendant went East on his selling trips and left plaintiff in complete charge of production of the magazine. (R. 166-170) Plaintiff asked defendant about the group that was to produce her play and he told her he did not have the group nor the funds. Additional discussion was then had about getting something in writing between them.

In January of 1958, Articles of Incorporation were prepared by defendant's attorney Louis Licht and filed with the Secretary of State under the name of "General Practice Publishing Co." The parties agreed that the corporation would have the right to sell these works, in addition to operating the magazine "General Practice", which was then owned by Dr. Soforenko, and in return for the transfer of certain rights of the sale of the works of the

corporation each of the parties was to receive half of the stock of the corporation.

On February 7, 1958 plaintiff and defendant entered into a memorandum agreement (Exhibit A) which is attached to the answer and counterclaim and by the terms of which the defendant agreed that the stock was to be held by them as joint tenants with right of survivorship. Although no stock was actually issued in the corporation and no assignments of the copyrights of the works or the magazine were ever made to the corporation or to Dr. Soforenko pursuant to Section 28 of Title 17, U.S. Codes, the parties continued to operate as though the corporation had actually come into being. At all times, however, the defendant was aware of and consented to and agreed that the copyrights of plaintiff were to remain with plaintiff. (R. 406) (Exhibits J, 44, 22, 6, 10, 11, 40, 45)

Two significant sales were made, one of the sections of the book named "Postgrad," for the combined price of about $60,000.

In August of 1958 defendant Soforenko and plaintiff parted company and Dr. Soforenko locked plaintiff out of the premises being used for the production of the works and told her he was carrying on without her and was taking it on by himself. At that time the plaintiff told the defendant he should not publish, sell, solicit or offer for sale any of the works copyrighted by her and she thereafter notified the defendant, as well as his attorney, Louis Licht, in writing to the same effect. (R. 248-249) Thereafter the defendant attempted to sell the copyrighted works, representing they were not owned by the plaintiff.

On January 14, 1959, plaintiff filed this complaint charging infringement of her copyrights, seeking damages and an injunction. On February 13, 1959 defendant filed an answer and counterclaim in which he claimed that the "corporation is the owner and copyright proprietor of the copyrights" and that the plaintiff was holding all copyrights in trust for the corporation. In his prayer he asked the court to declare that the corporation owned the copyrights and that the plaintiff was holding the copyrights in trust for the corporation.

On March 3, 1959 the defendant filed a motion to bring in the corporation as an indispensable party (at first denied, but later granted) (C.T. 16) and an affidavit was filed by Louis Licht, the attorney who drew up Exhibit A and who was then attorney for the defendant. In this affidavit (C.T. 17) the attorney stated that plaintiff had assigned all her right, title and interest to the corporation. This was later shown to be untrue, as no such assignment was ever executed.

In March 1959, defendant sold plaintiff's "Epidemiary" one of the copyrighted books, certified in plaintiff's name in the copyright office, and received a part of the money before the balance of the money was impounded by the trial court on May 28, 1959. (C.T. 276) The defendant caused approximately 90,500 issues of "Epidemiary" to be printed (Exhibit 37) and used the first moneys (approximately $18,000) received for his own purposes. The plaintiff charged the defendant with practicing fraud upon her and introduced evidence to this effect.

In January of 1958, defendant caused to be published Fictitious Firm name, claiming himself as the sole owner of a publishing company with the *very same name* as the corporation without the "Inc." January 17, 1958, the articles of incorporation had been signed and the defendant's notice of sole ownership of the Fictitious Firm name was dated January 24, 1958. (Exhibit 64)

At the outset of the court trial the court separated the issues and the issue as to ownership of the copyrights and concluded that the parties had entered into a joint venture and that since they were in a joint venture, thereby in effect said that it was unnecessary to try the other issues of the case. (Richmond v. Weiner, Slip Opinion, R. 351) The court thereupon never did try the separate copyright issue but only the joint venture issue, which was purely a state issue.

It is the contention of the petitioner that upon this determination the court lost jurisdiction to proceed and should have held the case pending trial in the state court under the authority of *England v. Louisiana State Board of Medical Examiners,* 375 US 411, 11 L.ed.2d 440 and *Railroad Commission v. Pullman Co.,* 312 US 496, 85 L.ed. 971.

During the course of the appeal defendant Soforenko died and petitioner thereupon petitioned the Circuit Court to re-examine its decision in the light of Exhibit 71, Exhibit A attached to the answer and counterclaim, which was introduced by the defendant, with the result that the death of Soforenko passed the entire right of copyright to the survivor. Although it was the contention of the defendant throughout, and by his attorneys, that the cor-

poration was, in effect, a de facto corporation, and claimed Exhibit A—Also 71—expressed the intent of the parties —it relied on the fact that no stock was ever issued by the Corporation Commissioner to nullify the declaration of the right of survivorship and the testimony of Soforenko that he intended all rights in the copyrights to flow to the plaintiff.

The plaintiff, carrying her burden of proof, produced a certificate of registration under the provisions of Title 17, Section 29, U.S. Codes. This created a presumption and prima facie evidence of her ownership of the copyrights. No assignment in writing pursuant to the provisions of Sections 28-30 of the Copyright Act were produced by the defendant.

The decision of the Court of Appeals attempting to decide the state issue of joint venture, without an opportunity to try the other issues which would be raised in the state court trial, such as fraud and deceit and an accounting, all of which are pending in separate state court actions in the State of California between these parties, would vitally affect the state cases. The decision of this Court on the issue of joint venture could have a vital effect on the suits between the plaintiff and the doctor's estate in respect to her various claims in the probate estate and in other suits pending in the state courts.

The state court actions are: No. 721201 in the Superior Court of the County of Los Angeles, entitled Virginia Richmond v. Harry Soforenko, etc., for fraud, deceit, declaratory relief, rescission, cancellation of instrument, accounting, damages, conspiracy, breach of

contract, quiet title, constructive trust re building at 1721 West Olympic Boulevard, Los Angeles, work and services rendered, account stated, moneys due on promissory notes for $40,500.00; No. P487604, in the Matter of the Estate of Harry Soforenko, Deceased; and No. 877850, Virginia Richmond v. Albert Weiner, as Executor of the Estate of Harry Soforenko, et al. (R. 377, 378)*

Other claims or suits have been filed in which the petitioner herein has been named as a purported joint adventurer and the decision of the federal court could be res judicata and determinative of these issues in the state courts where the court here has assumed jurisdiction of a state question without an opportunity to defend as against them unless this Court grants certiorari and corrects the judgment in this case and dismisses the action for want of federal jurisdiction.

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*California Superior Court No. 721 201 (Los Angeles) *On April 20, 1959,* as soon as it was possible after Soforenko had dismissed the Spperior Court Action on April 6, 1959, Virginia Richmond filed a verified complaint in the Superior Court, No. 721 201 against Harry Soforenko, Louis Licht, Bee Soforenko, Does I thru 8. This action is for Fraud and Deceit, Declaratory Relief, Recission, Cancellation of Instruments, Accounting, Damages, Conspiracy, Breach of Contract, Quiet Title, Constructive Trust (*re* Building at 1721 W. Olympic), Work and Services Rendered, Account Stated; Monies due on Promissory Notes ($40,500).

Soforenko filed a verified answer, but no cross-complaint. In Soforenko's Answer he denied that he ever had any agreements whatsoever with plaintiff excepting the February 7, 1958 Agreement. [Ex. A.]

The hereinabove case is *co-pending* with the instant case and will not be heard until this instant case is disposed of, by stipulation and Superior Court Order.

In the early beginning of this case, and before evidence was taken, both sides agreed that the federal court did not have jurisdiction of the issue of joint venture. On March 17, 1959, plaintiff in her answer to the counterclaim asked that the lower court dismiss the counterclaim herein and the court declared that it lacked jurisdiction of the matter of said counterclaim. (C. T. 242, 243, 233) The answer and counterclaim sought to bring within the federal jurisdiction the very controversy being litigated and in litigation in the state court and still pending in the state court. (R. 5, 6, 540, 541; C. T. 21, 9-17, 19, 54, 243, 252, 271, 322, 324.)

The jurisdiction of the federal court cannot be enlarged by injecting into a copyright case matters that are purely within state jurisdiction.

Danks v. Gordon, 272 F. 821.

The respondent appellee also stated in his brief in the Court of Appeals that "It was, and is, the position of appellee that if the copyrights were invalid the court below would have had jurisdiction so to determine but no further jurisdiction except to dismiss;". The appellee, however, contended that the court below had jurisdiction to determine that appellee could not be guilty of infringement because of a joint venture between them, with which position petitioner disagrees and which raises an important question of federal and state jurisdiction which has not been but should be passed upon by this Honorable Court.

It is significant to note that the trial court crossed out the words: "and that the same be dismissed with prejudice" when the court signed the judgment, said judgment

having been prepared by defendant's counsel. [Clks. Tr., p. 204, lines 18-19.]

The trial court put an arbitrary time and subject limit in the trial (R. 553, 554, 555) and excluded arbitrarily issues of fraud and other issues involved in plaintiff's claim. Thus she was denied due process of law guaranteed by the Fifth Amendment, United States Constitution. The court's colloquy is contained in the reasons for granting the writ for this Court to judge and to grant certiorari in its supervisory capacity regarding judicial conduct of a trial.

During the pendency of the appeal Dr. Soforenko died. Since the parties were operating under the agreement that the stock of the corporation was to go to the survivor, it clearly expressed his intent that this carried with it any claim of interest in the copyrights. Certiorari is necessary to decide this point.

The appellee in his brief in the Circuit Court himself said:

> "Second, an instrument may be entirely void under a code section, statute or common law, but nevertheless serve as cogent proof of the intent of the parties to it. For example, a written agreement to commit a crime may be void and unenforceable but nevertheless constitute clear cut evidence of the intent of the signatories. The mere fact that neither party may have been entitled legally to enforce the undertaking to issue shares has no other effect than to leave the parties as joint adventurers. The trial judge put the point succinctly as follows:

'This Agreement may be void as far as the corporation commissioners is concerned, but it is not void as to the intent of the parties' [Rep. Tr. p. 367, lines 19-21].'"

That intent was that plaintiff with right of survivorship should own the copyright in any event, if he died.

QUESTIONS PRESENTED

1. Whether a federal court, which has jurisdiction under the Copyright Act but separates the issues involved in a lawsuit at the outset to determine whether the litigants are joint venturers, an issue purely within the jurisdiction of the state courts under state law, loses jurisdiction when he determines this separate issue and should stay all proceedings until the entire matter of the relationship of the parties is determined in the state court proceedings pursuant to *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 11 L.ed.2d 440 and *Railroad Commission v. Pullman Co.,* 312 US 496, 85 L.ed. 971.

2. Whether the federal court, if it does accept jurisdiction to try all of the issues involved, should also try the issues undecided including fraud and deceit and give the parties a chance, if necessary, to amend their pleadings to encompass the other non-federal court questions which it deems are embraced or should be decided in the federal action.

3. Whether parties who operate, presumably, in connection with a corporation whose stock has never been issued, are estopped to deny contract provision which

would affect the stock ownership and, in effect, affecting the ownership of the copyrights after death, assuming that the decedent had acquired any rights in the copyright.

4. Whether a transfer of a copyright can only be made in writing pursuant to the statutory requirements of Title 17, Sections 28 and 30 of the Copyright Act. The Copyright office has no other way of checking up copyright rights without complying with this requirement.

5. Whether the court, in the conduct of this case, was so prejudiced against plaintiff as to deny her fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

6. Whether the court, in holding that there was a joint venture in the copyrights, should have dismissed the federal case of infringement, and permitted the parties to return to the state court where their action has been stayed pending outcome of the federal case.

7. Whether a joint adventurer who terminates his joint venture relationship can be guilty of copyright infringement of the holder of the copyright and be liable in damages for the infringement following termination of the joint venture, if one existed.

8. Whether an assignment in writing is a statutory requirement to give joint ownership to a copyright. (Section 30, Title 17, U.S. code.)

REASONS FOR GRANTING THE WRIT

This case involves an important question of copyright law not heretofore decided by this Court as to whether

ownership of a copyright is partly lost without an assignment in writing as required by Title 17, Sections 28-30 and whether persons who enter into a joint venture lose their ownership of the copyright they hold unless it is so assigned.

This case also involves a question of whether the case should have been remanded to the state court when the trial judge determined that there was a joint venture between the parties and therefore no federal question and no infringement involved. (R. 636)

In *England v. Louisiana State Board of Medical Examiners,* 375 US 411, 11 L.ed.2d 440, the Court held that when a federal court is properly appealed to, it may take jurisdiction but when a state question arises, it should remit the case back to the state court and abstain from further proceedings until the issue is there decided. This is in line also with *Railroad Commission v. Pullman Co.,* 312 US 496, 85 L.ed. 971. Also see Bell v. Hood, 327 US 678 and Calhoon v. Harvey, 379 US 138.

The state courts have jurisdiction of an action only involving a contract.

Fisher v. Hill, 314 App. Div. 772, 209 N.Y.S. 369

A person may not confer jurisdiction on federal courts by alleging an infringement.

Ohman v. City of New York, 168 F. 953

A copyright property under the federal law is wholly statutory and depends upon the right created under the Acts of Congress passed in pursuance of the authority conferred under the Constitution, Article 1, Section 8, Clause 8.

Bobbs-Merrill Co. v. Strauss, 210 US 339, 52 L.ed. 1086

American Tobacco Co. v. Werckmeister, 207 US 284, 52 L.ed 208

See also:

Ohman v. New York, 168 F. 953

Laemmle Music Co. v. Stern, 209 F. 129

Goldwyn Pictures Co. v. Howells Sales Co., 282 F.9

Gibbs v. Buck, 307 US 66, 83 L.ed. 1111

White v. Reach, 26 F.Supp. 77

This Court should Pass On The Many Errors of The District Court, As Affirmed by The Court of Appeals, Involving As They Do Many Procedural Errors.

The District Court erred in holding that rights in a copyright may be secured other than by assignment, grant or mortgage signed by the proprietor of the copyright and has disregarded statutory law. The judgment is violative of the *Copyright Statute*, particularly Title 17, U. S. C. A. Sections 17, 27, 28 and 30.

An assignment in writing is essential to a valid transfer of copyright. *17 U. S. C. A. section 28.*

The Judgment is incomplete and is not determinative of the rights of the parties involved in that it fails to adjudicate the status, rights, obligations and responsibilities of defendant Corporation or the position or rights of plaintiff and defendant Soforenko respectively in respect to said corporate defendant.

The Court erred in that it would give no time to plaintiff, even on the *one* issue, to cross-examine, im-

peach and refute defendant Soforenko and his only two witnesses, which plaintiff was prepared to do. The Court explicitly denied the right of rebuttal and interfered with and interrupted the presentation of evidence and participated in the defense.

The judgment was not based upon substantial evidence but was based on the whims, caprices and prejudices of the Court.

Re Depositions Pending Appeal

Plaintiff took the depositions of defendant, his attorney and his witnesses pending appeal pursuant to *Federal Rules of Civil Procedure*, 27(b), 34(1), 43(b) and the testimony elicited is in contradiction to the testimony given at the trial. All plaintiff's claims in her affidavit in the lower court were authenticated. [Clk. Tr. pp. 347-354]. Said affidavit wherein plaintiff stated that the defendant and his two witnesses had perjured themselves at the trial went unanswered by the defense. Defendant testified that *he makes no claims that he wrote any of the material introduced by the defense as Exhibits L, N, O, P, Q, R, and S, or any of the papers brought in by subpoena duces tecum.*

Plaintiff brings to this Court's attention that there is not one piece of documentary evidence before them which indicates that defendant did any writing whatsoever on M. P. I. or any other of plaintiff's works and now defendant admits there is none.

The motion and said accompanying affidavits before the United States Court of Appeals went unanswered by the defendant.

There is no refutation in the defendant's brief in answer to plaintiff's brief charging that the defendant and his two witnesses perjured themselves. And during the hearing on appeal before the United States Court of Appeals for the Ninth Circuit, the defense ignored plaintiff's Reply brief and oral argument that the defendant and his two witnesses perjured themselves at the trial.

Rule 60 and Subsec. (a) of Rule 59, of Federal Rules of Civil Procedure;

Federal Practice & Procedure, Barron & Holtzoff, Sec. 1325, p. 406;

United States v. Kraimann, D. C. Ky. 1943, 3 F. R. D. 473.

Forrest Cool, *Law Review, Evidence,* p. 52;

Strangeway v. U. S., 312 F. 2d 283, 286, 9th Circuit;

Johnson v. U. S., 149 F. 2d 31, 44, 7th Circuit;

Martin v. U. S., 17 F. 2d 913, 5th Circuit;

Larrison v. U. S., 17 F. 2d 973, 5th Circuit.

Finding of Fact X Is Incomplete in That It Makes No Mention of the Other Copyrights Which Are Before This Court and Is Incorrect by Virtue of Using the Words "Subsequent" and "Aforesaid Joint Venture."

C. The ownership of the copyrights not mentioned in the judgment and which must be determined, are: 1960 Medical Practice and the 1960 Postgrad. The Trial court had jurisdiction of these works. [Clk. Tr. pp. 100, 102; p. 110, lines 29-32; pp. 111, 112, 114, p. 280,

to p. 319.] There have been court orders concerning these works.

Plaintiff spent $4,461.45 in expenses alone on Postgrad 1960. [Clk. Tr. p. 283, to p. 314, is an accounting of the expenses.]

The Epidemiary, *at no time,* was ever a part of the Medical Practice Informant. *It was a separate publication.* Defendant avoided any mention that this was a separate entity by avoiding it in his pleadings and motions thereby causing confusion that only the Medical Practice Informant was involved in the litigation. [Exs. 8 and 10.]

This publication earned $18,500.00 and $12,333 was deposited with the clerk of the district court. [Clk. Tr. p. 276.] $7,500.00 of this money went to Bookman Press to satisfy their claim against the corporation and Soforenko and based on the Exhibit J, executed October 13, 1958.

"Medical Morsels" [Rep. Tr. p. 24, L. 18-19, p. 25, L. 9-10.] "I'm going to compile it." I'm preparing .... called ". . . Medical Morsels."

The Medical Poetry: "HIPPOCRATES", IMHOTEP, AESCALAPIUS, etc. [Rep. Tr. p. 24, L. 22, p. 222, L. 3-5] See *Exhibit 27.*

> *"This is the Medical History that I was working on before I met Dr. Soforenko, which was becoming part of PROGRESS OF MEDICINE in which I was going to put in the 1958 M. P. I., and then found out it was too expensive to print."*

MEDICAL TRAVELOGRAPHY, [Rep. Tr. P. 626, L. 5-7, P. 323, L. 1-17, Exhibit I in the first trial and before this Court.] MEDICAL TRAVELEER, [P. 225, L. 18-19, P. 225, L. 12-13]

AND THE MAGAZINE GENERAL PRACTICE AND ANY OF ITS PARTS.

The separate common law copyright or control of the right to reproduce belongs to the artist or author until disposed of by him and will be protected by the Court, *17 U. S. C. A. Section 27.*

D. Finding of Fact XII is erroneous and against the evidence before this Court and the Law.

The defendant Soforenko wrote to others that the copyrights belong to the plaintiff and said evidence is part of this Court record and contained in this brief. Defendant Soforenko told George Burch, attorney for Bookman Press, that the copyrights belong to plaintiff and this evidence is before this Court and within this brief. And even though the written agreement of February 7, 1958 was null and void, the recitals contained therein can be used as admissions, and paragraphs 4 and 5 [Exhibit A, attached to the Answer and Counter-Claim, Rep. Tr. p. 7] made the following recitals:

4. Soforenko shall assign to the corporation all of his right, title and interest to General Practice (the magazine).

5. Richmond shall assign to the corporation all of her right, title and interest to Medical Practice Informant.

The Trial Court Committed Error Which Effectively Deprived Plaintiff of a Fair Trial by Limiting the Trial to One Issue.

The Court determined to try first and separately and *ONLY* the issue whether the plaintiff was the sole owner of the copyrights or whether a joint venture composed of plaintiff and defendant owned the copyrights involved. In the course of trial of this issue, the Court so limited and restricted plaintiff in the presentation of her case, and the time allowed for presentation of her case, that a substantial body of evidence bearing on defendant Soforenko's fraud upon plaintiff in relation to the subject matter, and other evidence, all of direct relevance and materiality to the issue first and separately and only tried, could not be and was not introduced. The Court thereby committed error which effectively deprived plaintiff of a fair trial guaranteed by the due process clause of the Fifth Amendment U.S. Constitution.

Totidem verbis:

[Rep. Tr. pp. 553, 554, 555, lines 1-12]:

"The Court: Now, in this other case, Richmond versus Soforenko, is your witness here with those documents?

Mr. Dorfman: She is, your Honor.

The Court: How long will she take?

Mr. Dorfman: I would say half an hour or 40 minutes.

The Court: Do you have any rebuttal, counsel?

Mr. Stell: Yes. I have.

The Court: How much?

Mr. Stell: I would say a full day at least.

The Court: Well, now, you are not going to have a full day, I will tell you in advance. I have been very lenient on you. You are going to have until noon to finish this case.

Mr. Stell: I can't do it.

The Court: I am sorry, you will have that deadline and you might as well meet it accordingly. I am going to rule at noon.

Mr. Stell: As long as the Court understands I don't believe I can fully present the evidence —

The Court: What you believe and what you do are two different things. It is up to you, counsel, I have given you a lot of leeway, you have taken practically the whole time in this trial. Now, you are going to finish at noon.

Mr. Stell: Just as long as the record —

The Court: I don't care about the record, let the record show anything you want.

Mr Stell: I have a lot of things I would like to attempt to get into this case —

The Court: Enumerate them, enumerate them.

Mr. Stell: Well, for example, it is the opinion of this counsel that the true intent of the parties —

The Court: I don't want any opinion, I want you to enumerate what you are going to show.

Mr. Stell: Well, this is the enumeration, that the doctor has in fact acted in accordance with his real intent —

The Court: This is argument, I don't want it. I want to know what you are going to offer to prove.

Mr. Stell: I am going to show the operation of the doctor from the time the agreement was entered into until the present time, to show just exactly what he had done, how he has operated, what he has done with the magazine, what he has done with his advertisements.

The Court: Do you consider this to be rebuttal, counsel?

Mr. Stell: Yes, sir.

The Court: Well, I will deny you the right to produce it.

I am not going to waste forever and ever and eternity of time, counsel, while there are hundreds of people waiting for trial. What we are doing is depriving other people of the right to trial. We are wasting time.

Mr. Stell: I understand —

The Court: And I am prepared to rule, will be prepared to rule at 12:00 o'clock noon today. So you had better move forward."

The time was 10:00 a.m. Mr. Dorfman said he would take a half hour to forty minutes with his witness.

The defense was bringing in documents new to the trial. [See Clk. Tr. pp. 343-354.] Plaintiff did not get an opportunity to examine them and as the trial progressed the trial court promised that plaintiff could go back on the stand for rebuttal. [Rep. Tr. p. 611, lines 3-19.] However, the trial court took the plaintiff on as the court's witness and the rebuttal which plaintiff was hoping to bring forth never issued. The Court's questioning was over the same testimony previously gone into. [p. 632, lines 2-25; p. 633, lines 1-6.]

"The Court: I believe that is all, counsel. Anything further? It is 12:05. Your time has come to an end. Do you have anything further?

Mr. Stell. I have something further.

The Court: What?

Mr. Stell: I would like to put the doctor on the stand, your Honor, in refutation of some of his testimony.

The Court: You mean in rebuttal?

Mr. Stell: In rebuttal.

The Court: How is the doctor going to rebut his own testimony?

Mr. Stell: I believe I can show from his prior deposition —

The Court: Well, I will tell you what I am going to do, counsel. You can put your — introduce your deposition — what is the name of that deposition?

Mr. Stell: Vern Clark.

The Court: Put it in evidence if you wish.

Mr. Stell: I would like to, your Honor.

The Court: I am going to do for you what I indicated. I am going to take the case under advisement and I am going to give you a long, long time to — you two lawyers — to sit down and see if you can't work out something. Just how long I will have this under submission I don't know. But you both seem to think that you can outwit the Court on this case and *I am going to see what I can do to maybe bring a bad, disastrous case to both of these people,* try to bring you back to some reasoning and see if you can't sit down and work out something, some kind of a settlement, before I make a decision."

References to the limitation on the one issue: [Rep. Tr. p. 329, lines 9-10; p. 113, lines 7-17; p. 246, lines 23-25; p. 247, lines 1-9]:

"Mr. Stell: Your Honor, I am omitting many exhibits because they bear on the subject of infringement.

The Court: I understand, Counsel. You will have your time to take that up.

Mr. Stell: Yes.

The Court: Let's decide this issue first. I am not going to restrict you on the other issues.

Mr. Stell: I understand.

The Court: At the proper time. I want to take first things first. The bible says let's take first things

first. I guess it isn't unconstitutional to mention the bible once in awhile when you are on the bench."

[Rep. Tr. p. 251, lines 4-8, 16-25]:

"Mr. Stell: Your Honor, I believe that from here on in we go into another phase of the case.

The Court: We can reserve that, Counsel.

Mr. Stell: Yes.

The Court: I told you you can reserve that.

The Court: . . . Are you finished then, Counsel?

Mr. Stell: Yes, your Honor.

The Court: With the understanding that this mainly relates, until we conclude the issues that we have heretofore discussed, and when that is decided then we will decide whether or not you should go further with the evidence."

[Rep. Tr. p. 427, lines 2-6]:

"The Court: We are going to finish this issue this afternoon, counsel.

Mr. Dorfman: Good.

The Court: So keep it in mind. Comes 4:30 the case is going to be closed on this issue."

Much of the trial *time* so limited by the trial court *was used up by the trial court* in arguing points of law with plaintiff's counsel. This time could have been used in the furtherance of a fair trial. The following is a *partial* listing of the pages in the Reporter's Transcript in which the trial court argued with counsel: Rep. Tr. p. 420, lines 16-25; pp. 421, 422, 423, 424, 425, 426, 427,

428 (*9 pages*); pp. 352 thru 383 (*over 31 pages*); pp. 538 thru 550 (*13 pages*); pp. 553 thru 556; p. 592, lines 7-25; pp. 593, 594, lines 1-8; pp. 596, 597, 598, from pp. 613 thru 649 (the trial court conducted the trial from then on 36 pages); pp. 308, 313, lines 1-14 (almost 5 pages); p. 327, lines 19-25; pp. 328, 329, lines 1-7; p. 146, lines 10-25; p. 147, lines 1-23; p. 177 thru p. 185, lines 1-4 (*8 pages,* occasioned by trial court's previous remarks) in addition to all the other remarks made by the trial court throughout the trial. The various interruptions, and the *taking of one half day* from the trial time by the defense attorney because of another matter he had to attend to took more precious time. [Rep. Tr. p. 145, lines 16-25.]

The interruptions were sometimes error [Rep. Tr. p. 600, lines 19-20]; the trial court called a recess right in the middle of a question, and we *never* got the answer. Also time was used up when defendant's sister caused a scene. [Rep. Tr. pp. 486-487.] *While the court constantly demanded that we not waste time, he wasted it.*

The *entire* record must be read to see the injustice because at some points, the trial court *promised* a chance for rebuttal, *promised* the right to try the other issues, but *ultimately* denied both.

Plaintiff's counsel did his best to conform to all the trial court's requests.

[Rep. Tr. p. 540, lines 16-25; p. 541, lines 1-15]:

> "Mr. Stell: Now, *I have not yet had an opportunity to examine the doctor. I thought he would be put on in his own case.* But if the court feels

that there is any possibility that the doctor did any work on this I believe that I can establish that he didn't.

The Court: Counsel, the evidence indicates to the contrary already. Work is not a matter of taking a pencil down — if I sit down and give you an idea of a story and do nothing else and you do the whole book and write the whole story, don't I have part ownership in that copyright? — *I thought that if a person made suggestions — that somewhere along the line, at some point they became part owners of that copyright.*" (Emphasis mine.)

The defendant had only presented less than twenty pages of transcript [Rep. Tr. pp. 506-526] when the trial court said [Rep. Tr. p. 526, lines 17-25; p. 527, line 1]:

"The Court: Well, why don't you take her (Mary Stone) off the stand and bring her back? I am going to start a jury trial on Tuesday morning. I will pick the jury and will finish that morning. *But this is the end of this case, that is all there is to it.*"

The burden of proving four affirmative defenses by the defendant was not required.

Plaintiff's counsel, attempted to ask a question of the defendant, *just one*, on rebuttal, when defendant was the witness for the court, this was ultimately denied. [Rep. Tr. p. 641, lines 22-25; p. 642.]

[Rep. Tr. p. 543, lines 17-25; p. 544, lines 17-29]:

"Mr. Stell: Now, your Honor, I think that we can't forget some definite things about this. *We have not yet gone through this evidence.* Now, I have introduced piles of material and the court has not inspected these piles of material."

[Rep. Tr. p. 278, lines 14-18]:

"Mr. Stell: Your Honor, I anticipated originally that the plaintiff's case would take about two and a half or three days.

The Court: Yes, but that wasn't just limited to one issue, Counsel. We are now trying it on one issue."

[Rep. Tr. p. 277, lines 9-15]:

"The Court: Before we recess, Counsel, is there no way that you two gentlemen can stipulate this witness from the state, stipulate as to what she is waiting around here for, these records, can't you some way —

Mr. Stell: She has material that I intend to use for impeachment purposes, I have no way of using it until I get somebody on the stand to impeach."

The trial court restricted the testimony to the *first* issue to be tried [Rep. Tr. p. 182, lines 10-14]:

"The Court: But I would like, as near as you can, to keep the first testimony to this question of joint venture. We may dispose of this case, I have sort of a feeling that, one way or the other, we may arrive at a point and you gentlemen may then decide to settle the case."

[Rep. Tr. p. 174, lines 20-24.] Addressing defense counsel, Mr. Dorfman:

> "The Court: I want to finish this case if I can on Friday. I have a feeling that the testimony on this joint venture may be the end of the case if I sustain your position and that it is a joint enterprise, for it will pretty much terminate the situation except for accounting, won't it?"

Up to this point plaintiff had very little of her case in and the defendant had the burden of a *prima facie* case to overcome.

[Rep. Tr. p. 644, lines 8-25]:

> "Mr. Stell: Your Honor, I know the Court has stated that he doesn't wish any further testimony from me —
>
> The Court: Not on this issue."

[Rep. Tr. p. 425, lines 14-24]:

> "Mr. Stell: Well, your Honor, by the end of this day I will have spent about two and a half days. And that has definitely been my prospective—or prognosis in this case at all times. I always thought this would be a four or five-day case.
>
> The Court: Well, a four to five-day case on all of the issues. And we are now supposed to be trying one issue. I have other matters, counsel, besides this case, of people that have a right to come to the so-called fountain of justice, if they can get there."

The demeanor of the trial court, his manner, his intonations, his grimaces cold print does not preserve. A

stenographic record correct in every detail fails to reproduce the animosity of the atmosphere in a court room so charged. An upper court of necessity has to operate in the partial vacuum of the printed record. The trial court's intimidation of the plaintiff's counsel was grossly unfair.

The Trial Court's Statements

[Rep. Tr. p. 639, lines 9-14]:

> "I am anxious to see a case that obviously, on its face and from the hearing of it, has been a fight between a man and a woman and they are going to exhaust themselves financially and physically over something that they shouldn't do—*that is my only interest. I have no other interest than that.*" (Emphasis mine.)

[Rep. Tr. p. 636, lines 8-20]:

> "If I determine that there was a joint venture on those copyrights and that the doctor was a part owner, then the case will end there. There will be nothing further to do in this case. I can't understand what would be left of the case in the Federal Court, because there would be no infringement, and it is in this Court by reason of the infringement—*so that would end the case in this Court and the parties could go on ad infinitum litigating into eternity,* apparently the way it appears from this litigation." (Emphasis mine.)

[Rep. Tr. p. 648, lines 4-21.] The trial court said he would take his own good time in deciding the case and

then asked counsel how much time they desired to submit memorandums:

> "The Court: All right. I will give you—how long do you want, a year?
>
> Mr. Dorfman: Give us plenty of time, Judge.
>
> The Court: *A year, two years before filing?*"
> (Emphasis mine.)

A litigant is entitled to the honest unbiased judgment of the judges of those courts before who his case comes, and to full hearing and full argument in order that merits of his side of the controversy may be established.

> *Deppe v. General Motors Corp.*, 131 F. 2d 379, C.C.A. N. J. 1943.

Every individual is entitled to his own day in court in which to assert his own rights and to defend against their infringement.

> *Heaton v. Southern Ry. Co.*, 119 F. Supp. 658, D. C. S. C. 1954.

Application of Title 17, Sections 28-30, is a highly important question for this Court to decide.

The importance of the question involved in this case as to requiring an assignment of a copyright to be in writing pursuant to Title 17, Sections 28 and 30 of the Copyright Act (previously Section 42 of the former Act), cannot be under-estimated. Giving accurate information to writers, authors, publishers, motion picture producers and those seeking to use material that once had been

copyrighted and is in the public domain (or where copyrights have previously been assigned and transferred or renewed), is a highly important function of the Copyright Office. Unless this statutory compliance is carried out, the Copyright Office has no means of knowing or informing motion picture companies, writers, authors, publishers and others of the existence or non-existence of the protective rights of the copyright or the expiration of the same. It is a regular practice of some attorneys in Washington to make searches in the Copyright Office. The clients must be guided by the records in the Copyright Office as to who owns the copyright.

To hold that a right in a copyright can be acquired in a joint venture without the written assignment required by Title 17, Sections 28-30 (previously Section 42) would be to nullify one of the principal purposes of the Copyright Act and the Copyright Office and to keep in the dark many motion picture companies and producers who would have to guess at whether someone held a joint venture unrecorded. This would destroy the function of the Copyright Act and a hearing is necessary in this Court to so determine in this case. This is a point that has never been passed on by the Court but should be in the construction and interpretation of the Copyright Act.

CONCLUSION

We pray for Certiorari and reversal of the judgment below.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

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APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA RICHMOND, *Appellant,* vs. ALBERT WEINER, as EXECUTOR of the Estate of HARRY SOFORENKO[1], *Appellee.*	No. 18,997

[September 9, 1965]

Appeal from the United States District Court
for the Southern District of California
Central Division

Before: CHAMBERS and JERTBERG, Circuit Judges, and BOWEN, District Judge

BOWEN, District Judge:

Before us is appellant's appeal from the Trial Court's judgment adverse to appellant (plaintiff below) in her

[1]Mr. Weiner as such estate executor was as appellee substituted for Harry Soforenko, the original appellee who died pending this appeal. The word "appellee" in this opinion refers to the original appellee Soforenko in this case except that where the context so indicates, "appellee" refers to Weiner as executor of the deceased Soforenko's estate.

action for infringement of copyrights, delivery up to appellant of the copyrights and recovery of damages for appellant, and in appellee's counterclaim, he sues for declaration of appellee's asserted rights in the copyrights.

The Trial Court had jurisdiction under 17 U.S.C.A. § 1 et seq. This court has jurisdiction under 28 U.S.C.A. §§ 1291 and 1294.

Early in the trial below, the Court directed that in order to better conserve the Court's work time and for its convenience, the important issue as to whether appellant was the sole owner or, with appellee (defendant below), a joint owner of the copyrights in question should first be tried, because if it should be determined that appellee is such a joint owner, this infringement action might be ended without further trial, since a copyright owner cannot infringe against his own copyright.

The principal issue on this appeal as at the trial is whether appellee is a joint owner with appellant of the copyrights, particularly those related to Medical Practice Informant and its parts recorded in appellant's name in the patent office, although other issues and alleged errors dealt with in the trial will be reviewed.

Both parties admit, as did appellant's counsel during the trial, that since about June-July, 1957 and during approximately the first eight months, and until their business breakup, in 1958, they were engaged in a joint venture (at first oral and later written) producing, publishing and selling General Practice magazine, originated by appellee, and Medical Practice Informant and its

parts in her name copyrighted by appellant. The parties, however, since their breakup, have been adamant in their respective contentions, appellee claiming joint ownership with appellant of the copyrights and appellant denying such claim of appellee and asserting appellant's exclusive ownership of the copyrights.

Although admitting the joint venture for the production and sale of the copyrighted materials, appellant at all material times has denied and now denies that she ever did convey or intend to convey to appellee any proprietary title or interest in or to the copyrights relating to Medical Practice Informant (also called MPI) or to any of its parts. Appellee has at all such times claimed for himself a one-half joint ownership interest in all such copyrights.

Appellant claims that prior to her becoming a business associate of appellee she owned two publishing houses, a recording company and numerous copyrights, and had written the musical comedy "Cheesecake and Horses", and songs, words, music and medical poetry. The appellee, a licensed physician, at the trial claimed to have for about twenty years since 1938 published medical magazines, including General Practice magazine.

Pursuant to their June-July 1957 oral joint venture, appellee provided qualified personnel to do the researching, compiling and editorial work of MPI, supplied money and credit for printing and sales work, was in charge of sales, and made three sales of excerpts from MPI to pharmaceutical houses in 1958, one in February, one in May and one in August. All of these sales were made and paid for before appellant undertook to re-

possess the copyrights and while she and appellee were still working together in pursuance of the joint venture.

In furtherance of the plans and purposes of the June-July 1957 oral joint venture, the parties signed a written agreement dated February 7, 1958, in evidence as Plaintiff's Exhibit 71, also sometimes called Exhibit A, by which appellee agreed to transfer all of his right, title and interest in the General Practice magazine and appellant agreed to convey all her right, title and interest in Medical Practice Informant to General Practice Publishing Co., Inc., a corporation to be created and used by them in their joint venture.

At the trial the parties stipulated that the General Practice Publishing Co., Inc., was formed as contemplated in the February 7, 1958 written agreement, and that the Commissioner of Corporations granted a permit to the corporation to issue 250 shares of stock alike to appellant and appellee, but none of the stock was actually issued because of later disputes between the parties. However, with the help of both of them, the production and sale of MPI continued through the General Practice Publishing Co., Inc., each of the parties co-signed checks for the corporation on a bank account in the corporate name, some of those co-signed checks so drawn were payable to appellant in substantial amounts, she had the use of a company car, she continued to be and is still secretary-treasurer of the corporation and more significantly she as such corporate officer transacted in the corporate name important corporate business.

Both appellant and appellee were called as witnesses and gave testimony at the trial. Appellant testified that

she at all times expressly stated and emphasized to appellee that she wished to retain and in all her related acts intended to and did retain all proprietary interests in her copyrights, and that all she ever granted or intended to grant to appellee were rights for him to share equally with appellant in the use and production of her copyrights and in the profits realized from such use and production and from sales of copyrighted products. She as a witness at the trial and as appellant on this appeal has vehemently contended and does contend that she has not by any written or oral statement or by any conduct conveyed, intended to convey or in any manner transferred to appellee any proprietary right in any of her copyrights including the ones respecting Medical Practice Informant and its parts.

Appellee at the trial also testified with equal vehemence and now on this appeal in substance and effect contends that, in the parties' 1957 oral joint venture agreement, in the written terms of their February 7, 1958 joint venture and in their conduct and attitude regarding their mutual property interests and at all material times until their disagreement which occasioned this litigation, the parties mutually agreed that appellee would and he did transfer to the joint venture all of his right, title and interest in appellee's magazine General Practice, and that appellant would and did transfer to the joint venture all her right, title and interest in Medical Practice Informant and its parts copyrighted in her name, and that appellee in joint venture with appellant was a joint owner of such copyrights.

As he contended in the Trial Court and now contends, appellee at the trial in substance and effect orally testified

(1) that in March 1957 appellee employed appellant to, and appellant did, perform certain services in connection with the publication of General Practice magazine; (2) that thereafter, prior to February 1958, appellee and appellant together conceived the idea for, compiled, edited, co-authored and arranged for publication of, the book Medical Practice Informant, as to which and its related business the parties were co-owners and joint venturers; (3) that to further their joint venture business relationship, the parties under date of February 7, 1958 entered into a written agreement, in evidence as plaintiff's Exhibit 71 and also as Exhibit A, providing, among other things, that the parties would form, with each owning one-half the corporate stock of, General Practice Publishing Co., Inc., a new corporation to which would be assigned all of appellee's right, title and interest to General Practice magazine and all of the right, title and interest of appellant to said Medical Practice Informant, a book to be published and sold to doctors; and (4) that the parties did form that new corporation and for several months until about the end of August 1958 carried on the contemplated joint venture business in the name of the new corporation, although its corporate stock was never issued and such issuance was finally prevented by the state corporation commissioner upon his receiving notice of the breakup of the parties' business relations near the end of August 1958.

Upon the allegations, contentions and evidence before it, the Trial Court decided that the book Medical Practice Informant and its parts were compiled, written, printed, published, owned, sold and distributed by the joint venture created by appellant and appellee, and that

the copyrights in and to the book Medical Practice Informant and all its parts, registered in appellant's name, were owned in joint venture by appellant and appellee as joint owners of the copyrights, and that as such joint owner appellee could not infringe his own copyrights. The Trial Court orally summarized its findings in substance as follows:

> "That there were copyrights claimed and infringement claimed. That I held the copyrights to be owned in joint venture by the plaintiff and defendant, and therefore there could be no infringement. An owner cannot infringe his own copyright."

In view of the foregoing, the Trial Court held that appellant take nothing by this action.

In oral argument before this Court appellant contended that the Trial Court erred in that decision, first, because the proof was limited to the issue of copyright joint ownership and appellant in her proof was by the Court improperly confined to evidence of what was said or done respecting the creating of such joint ownership when after severance for separate trial of the ownership issue and without diverse citizenship of the parties, says appellant, there was no federal jurisdiction to try such ownership issue alone; and second, because appellant was improperly prevented by the Trial Court from adducing evidence of fraud by appellee in obtaining such proprietary interest, if any, as he obtained in the copyrights.

In effect, appellant in her opening brief states that, on the whole case, being one for redress of alleged copyright infringement, the Trial Court did have jurisdiction, but during the trial and here she did and does now contend

that, upon severance and separate trial of the non-federal copyright ownership issue alone, the Trial Court lost and did not have jurisdiction to try that issue alone, and that, therefore, this Court does not have appellate jurisdiction to review the merits of the Trial Court's action on that non-federal issue.

At the trial, however, the following occurred:

> "THE COURT: Let's decide that issue (ownership) before you take up anything else. I believe we will save your time and the Court's time. Can't you do that?
>
> MR. STELL (appellant's counsel): I can do that.
>
> THE COURT: All right, let's do that." (Parentheses added.)

A federal trial court in its discretion may upon its own motion properly separate an issue from others and confine the introduction of evidence to that separated issue alone if the court in the exercise of reasonable discretion thinks that course would save trial time or effort or make the trial of other issues unnecessary. That is true of issues as to which the court would not have jurisdiction but for their relation to other issues within the court's jurisdiction. Whether there should be severance and separate trial of an issue is primarily a question concerning the court's trial procedure and convenience, not a question concerning the merits of the case. In this case, the Court's jurisdiction to determine the merits of the whole case, including the trial-separated non-federal issue as well as the remaining issues within its jurisdiction awaiting disposition, continues undiminished by such severance and separate trial of the copyright ownership issue. Rule

42(b), F.R. Civ.P.; Moss v. Associated Transport, Inc., 33 F.R.D. 335; Fidelity & Casualty Co. v. Mills, 5 Cir., 1963, 319 F.2d 63. In Chicago G. W. Ry. Co. v. Chicago B. & O. R. Co., 8 Cir., 1952, 193 F.2d 975, 978, it was held:

> "Where jurisdiction attaches by reason of a federal question it extends to the whole case and all its issues, federal or non-federal. Indeed, in such circumstances the court may decide the issue on state law alone, without deciding the federal question. Here it appears from the complaint . . . that plaintiffs' claims were bottomed on a substantial federal question, and hence, the court had jurisdiction to dispose of all issues when a determination of such issues became necessary or appropriate in the administration of justice."

We hold the Trial Court properly separated for trial the copyright ownership issue, did have jurisdiction of the separated issue and did not improperly restrict the method and scope of proof on that issue.

In connection with her objection to the Trial Court's severance and separate trial of the copyright ownership issue, appellant assigns as additional error the Court's failure to receive evidence that appellee's ownership interest, if any, in appellant's copyrights was acquired through fraud and was, therefore, invalid.

The law requires that fraud as an issue be specifically pleaded as indicated by the following:

> "Clearly, in an action for deceit, or other suit in which the cause of action is based directly upon fraud, the fraud must be pleaded." 24 Am.Jur. 72.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Rule 9(b), F.R.Civ.P.

"A pleading requisite to enable the party who files it to offer parol evidence of fraud in a written contract for the purpose of avoiding the contract should contain allegations of the fraud that are clear and positive." 24 Am.Jur. 74; 56 A.L.R. 148.

Here appellant did not, in her original complaint, in her answer to appellee's counterclaim or in the pretrial order, allege or contend that the written contract of February 7, 1958 itself or any property right or interest thereunder was obtained by appellee through fraud. The record does not disclose that any evidence of fraud or deceit on the part of appellee was received at the trial, although the record does reflect indications that such evidence was or would be available for use at the trial by appellant. She, however, did not offer any such evidence, and the Court, and counsel in their briefs and arguments, did not treat the issue of fraud as if it were supported by relevant admitted evidence. There was no evidentiary basis for amending the pleadings to accord with the proof. There was no waiver of the pleading requirement as to fraud. We, therefore, on this appeal cannot consider that issue, because appellant did not plead it or validly bring it before the Trial Court, and that Court properly did not determine it. United States v. Waechter, 9 Cir., 1952, 195 F.2d 963, 964; Pacific Queen Fisheries v. Symes, 9 Cir., 1962, 307 F.2d 700, 719-720; Monge v. Smith, 9 Cir., 1956, 229 F.2d 361, 366, Syl. 2.

Contending that notice of the Court's findings[2], conclusions and judgment of August 8, 1963 was not given her, appellant asserts as error the Trial Court's August 27, 1963 order vacating its August 26, 1963 minute order which, after a hearing on that day participated in by the parties, set aside said findings, conclusions and judgment of August 8, 1963 for the limited purpose of allowing appellant to make her motion for new trial which without such setting-aside order was time barred. The vacating order complained of was entered by the Trial Court on the first day after that August 26th hearing and on the same record as that existing when the August 26th order was entered and without further hearing or additional proof, and was obviously meant by the Court as the corrected, complete and finally considered order covering the subject of the hearing on the day before. In that situation, a federal trial court may, as the Court below did, vacate, amend and correct its orders. When that is being done, as was held in Suggs v. Mutual Ben. Health & Accident Ass'n., 10 Cir., 115 F.2d 80, 82:

> "It makes no difference whether the attention of the court is directed to a further consideration of its judgment by a pleading filed as a matter of right, or by a pleading which has no standing in the case as a matter of law, or springs from the court itself. . . .
>
> "That at the conclusion of its consideration the court adhered to its former judgment does not alter the situation."

---

[2]Although the giving to appellant's counsel of such notice by mail was attempted by appellee's counsel, appellant's counsel denied ever receiving it.

See Zimmern v. United States, 298 U.S. 167, 169-170, holding that

> "The judge has plenary power . . . to modify his judgment for error of fact or law or even revoke it altogether."

We reject appellant's claim of error based on the Trial Court's August 27th order vacating and changing its ruling in its minute order of August 26, 1963.

Whatever rights appellee may have acquired or claimed by virtue of the February 7, 1958 contract, he has at all material times claimed to be a joint owner of the copyrights for the book Medical Practice Informant and its parts, and in that connection contends that he jointly with appellant conceived, compiled and created that book and its parts for which appellant obtained only in her name the related copyrights. That work effort of appellee is evidenced by his own testimony and that of corroborating witnesses, and we regard as established, as undoubtedly the Trial Court did, the fact that appellant and appellee co-authored that book and its parts. Since that book and its parts were so jointly conceived, compiled and created by the joint efforts of both appellant and appellee and "equity regards as done that which ought to be done" (19 Am.Jur. 316), appellant although having the copyrights registered in appellant's name only held the same in trust for the joint venture and appellant and appellee as its two members. Appellee, therefore, was and is at all material times in lawful right a joint owner with appellant of the copyrights covering the book Medical Practice Informant and its parts. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 2 Cir., 1955, 140 F.2d 266, 268. As such owner appel-

lee could not and did not infringe such copyrights, and we agree with the Trial Court in so ruling.

Appellant objects to the Trial Judge's interrogating witnesses and charges that the Judge displayed malice and prejudice in the conduct of the trial. It should be noted that this case came before this Trial Judge as the latest trial proceeding among four separate court cases before different judges or courts involving some matter connected with the mutual business relations of appellant and appellee. In three of the cases including this one they have been adversary parties. In the fourth case they together sued a former employee. In a previous trial of this adversary case before another judge, a mistrial had been ordered because that judge had entered a pretrial order under the mistaken belief that it had been approved by both parties,—a fact later denied by one of them with acrimonious undertones. Throughout the retrial of this case in the Court below there was a hostile and bitter attitude of parties or witnesses, one against another.

The record of such retrial discloses in the testimony of some of the important witnesses a marked degree of partisanship and a proneness to anticipate questions and to make voluntary or unresponsive answers to the questions asked. Also, experienced counsel in notably significant situations failed in some instances to pursue the Court's suggested line of inquiry of the witnesses and in other instances failed to frame questions so as to avoid voluntary and non-responsive answers. In a number of such instances the Trial Judge did personally interpose his inquiries and himself interrogated the witnesses. But in all those instances the record appears to this Court to reflect in the Trial Court's questioning the witnesses

and in his attitude a proper desire on that Court's part to avoid needless labor and time consumption by the Court, counsel and witnesses, and to appropriately expedite the trial proceedings. Considering all of the complained of occurrences in the light of the whole record, we find no malice or prejudice in the Trial Judge's attitude towards either of the parties or their witnesses and no failure by the Trial Judge to accord to them due process of law.

In a comparable situation, this Court in Ochoa v. United States, 9 Cir., 1948, 167 F.2d 341, 344, held:

> ". . . it is the right and duty of the Federal trial judge to facilitate, by direct participation, the orderly progress of a trial. Queries by the judge which aid in clarifying the testimony of witnesses, expedite the examination or confine it to relevant matters in order to arrive at the ultimate truth, are eminently proper so long as this authority is exercised in a non-prejudicial manner."

See also Todorow v. United States, 9 Cir., 1949, 173 F.2d 439, 448; Glasser v. United States, 315 U.S. 60, 82, 86 L.ed. 680, 705. Upon those authorities and the facts above related, we hold that both of these parties had a fair trial.

Alleged errors, objections, contentions and arguments other than the foregoing have been urged by appellant. All of them we have carefully considered, but find no merit in them.

Our thorough consideration of the record convinces us that as to each and all of the Trial Court's findings

they are not clearly erroneous but on the contrary are supported by ample credible evidence.

The action of the Trial Court in this case is AFFIRMED.

APPENDIX B

STATUTES INVOLVED

United States Code, Title 17:

§ 1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsover thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided,* That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may

make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs. July 30, 1947, c. 391, § 1, 61 Stat. 652; July 17, 1952, c. 923, § 1, 66 Stat. 752.

§ 28. Assignments and bequests

Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will. July 30, 1947, c. 391, § 1, 61 Stat. 652.

§ 30. Same; record

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded. July 30, 1947, c. 391, § 1, 61 Stat. 652.

§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction. — To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.— To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not

be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statute, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

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